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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. —

ARNOLD J. HELLMICH, UNITED STATES COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Arnold J. Hellmich, as United States Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled cause on April 28, 1926 (R. 62), reversing the judgment of the United States District Court for the Eastern District of Missouri (R. 22).

Question presented

Are telegraph services or facilities rendered to the Missouri Pacific Railroad Company by the Western Union Telegraph Company, and in return for which the railroad company rendered transportation and other services to the telegraph company under the terms of a contract for the mutual exchange of services, taxable under the provisions of Sections 500(f) and 501(a) of the Revenue Act of 1918, and Sections 500(a) and 501 of the Revenue Act of 1921?

Statement

This action was brought in the United States District Court for the Eastern District of Missouri to recover taxes in the amount of $14,792.95, paid under protest on the transmission of telegraph messages during the period from March, 1920, to January, 1923, inclusive, under a contract between respondent and the Western Union Telegraph Company providing for the mutual exchange of services. This contract, in substance, provides that the services performed by each party are to be charged for on the books of the companies and at the end of the contract year bills rendered each party by the other, but no payment in money is to be made by the parties to one another except upon the excess, or balance of excess, above $75,000 worth of services received by either party. (R. 15–17.)

It is the contention of the Government that the telegraph services rendered respondent, whether within the maximum allowance of $75,000 or in excess thereof, were paid for by transportation and other services which respondent in turn rendered the telegraph company, and therefore that the telegraph messages so transmitted were taxable under the provision of Sections 500(f) and 501(a) of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1057, 1101, 1102) and Sections 500(a) and 501 of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 284).

The District Court gave judgment for the Government. (R. 22.) Upon writ of error (R. 2) this judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit (R. 62), which held that only those telegraph messages in excess of the contract allowance of $75,000 were subject to tax.

For the language of the statutes and the contract involved, and a more detailed statement of the facts, reference is made to the supporting brief included herein.

Reasons for granting the petition

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court and in holding that telegraph messages up to the amount of $75,000 provided in the contract between respondent and the Western Union Telegraph Company were not taxable under the provisions of Sections 500(f) and 501(a) of the Revenue Act of 1918,

and Sections 500(a) and 501 of the Revenue Act of 1921.

2. The decision of the Circuit Court of Appeals is contrary to the decisions of the United States District Court for the Southern District of New York in *Western Union Telegraph Company* v. *Delaware, Lackawanna and Western Railroad Company*, 282 Fed. 925, and *Delaware, Lackawanna and Western Railroad Company* v. *Bowers*, unreported to date, but printed in the appendix to the supporting brief herein, both of which cases presented the same question involved in the case at bar.

3. The principle involved is one of great public importance and of importance to the Government in the administration of the revenue laws. Suits to recover taxes collected under a similar state of facts are now pending in various District Courts throughout the country, and a large number of claims for refund are also pending in the Treasury Department. If the decision of the Circuit Court of Appeals remains unreversed a great number of additional claims will be filed and a great number of additional suits brought for the recovery of taxes so collected. The Treasury Department estimates that very large sums of money are dependent upon the final decision of the principle here involved.

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the judg-

ment of the Circuit Court of Appeals for the Eighth Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

BRIEF IN SUPPORT OF PETITION

Opinions of the courts below

The opinion of the District Court has not been reported, but will be found at page 43 of the transcript of record. The opinion of the Circuit Court of Appeals for the Eighth Circuit has not been reported, but will be found at page 56 of the transcript of record.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on April 28, 1926. (R. 62.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (Ch. 229, 43 Stat. 936.)

The facts

This action was brought to recover the sum of $14,792.95, taxes paid by the respondent on the transmission of telegraph messages for it by the Western Union Telegraph Company during the period from March, 1920, to January, 1923, inclusive. (R. 20, 21.)

The telegraph messages for the transmission of which these taxes were assessed and collected were

transmitted under the terms of a contract between the respondent and the Western Union Telegraph Company for the mutual exchange of services, dated October 24, 1911, the fourth paragraph of which reads as follows (R. 15–16):

> Fourth. The Telegraph Company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroads covered by this agreement, as the Railway Companies may desire, for messages pertaining to their railroad business, to be authorized by franks permitting all classes of messages and telegraphic letters in public use on the lines of the Telegraph Company, to be issued to such officers and agents of the Railway Companies as may be designated by their Presidents or General Managers; and the Railway Companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the Telegraph Company may require for its employees, supplies and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews and equipment for distribution service, and outfit, boarding and tool cars for work on the lines along said railroads, whenever required by the Telegraph Company. The transportation of employees to be authorized by passes to be issued by the Railway Companies on request of the Superintendent or

other authorized officer of the Telegraph Company.

Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of services rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during such year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000, there shall be no payment by either party to the other therefor.

The account between respondent and the telegraph company for the years covering the period in suit shows that the accounting was in terms of dollars and cents; that for 1921 and 1922 both parties to the agreement exceeded the maximum of $75,000, and that for 1920 the services rendered to the telegraph company by respondent exceeded the maximum, while the services rendered by the telegraph company for respondent were below the maximum. (R. 51.)

The Commissioner of Internal Revenue, under the provisions of Sections 500(f) and 501(a) of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1057, 1101, 1102) and Sections 500(a) and 501 of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 284) assessed taxes on all the telegraph messages transmitted under the terms of the above-quoted contract. Payment was made under protest, and upon the failure of the Commissioner of Internal Revenue to act upon a claim for refund within six months after it was filed (R. 21, 22) this action was brought in the United States District Court for the Eastern District of Missouri for the recovery of the taxes so paid.

The District Court gave judgment for the Government (R. 22), on the ground that although the railroad company did not pay in money for telegraph messages up to $75,000, yet it paid in kind by the services which it in turn rendered for the telegraph company. Upon writ of error (R. 2) this

judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit (R. 62), on the ground that "the contract up to $75,000 was a swapping of privileges rather than of service, and the mutual service up to that limit was free." It accordingly held that telegraph messages up to the amount of $75,000 are exempt and those in excess of that amount are subject to the tax.

Statutes involved

Sections 500(f) and 501(a) of the Revenue Act of 1918 (Ch. 18, 40 Stat. 1057, 1101, 1102), reenacted as Sections 500(a) and 501, respectively, of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 284) provide:

> SEC. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—
>
> * * * * *
>
> (f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided,* That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the

transmission of such dispatch, message, or conversation;

* * * * *

SEC. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

Paragraph (c) of Section 501 of the Revenue Act of 1918, also deemed pertinent, provides in part:

> The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. * * *

Pursuant to the authority vested in him by the above revenue acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Article 9 of Regulations No. 57 of the Treasury Department, which provides that—

> Where, by contract, a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500(a)) of the act. The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to

whether such messages relate to the operation of the business of a common carrier and whether they are " on line " or " off line " are immaterial. Thus, a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business " free " and all such messages over its lines off the railroad lines " free " to an amount not exceeding $10,000 per year calculated at its regular rates, and all messages over that amount at half rates, in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether " on line " or " off line," and whether " free " or at half rates, are subject to the tax provided by this section (500(a)) of the act. The tax must be computed, collected, and paid upon each such message.

Specification of error to be urged

The error which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Circuit Court of Appeals for the Eighth Circuit is:

The court erred in holding that the telegraph messages transmitted for respondent by the telegraph company up to the amount of $75,000 did not, under the terms of the contract between the two companies, constitute services for hire, and that they are therefore not taxable under the provisions of Sections 500(f) and 501(a) of the Reve-

nue Act of 1918 and Sections 500(a) and 501 of the Revenue Act of 1921.

Argument

THE TELEGRAPH MESSAGES TRANSMITTED FOR RESPONDENT BY THE WESTERN UNION TELEGRAPH COMPANY UNDER A CONTRACT FOR THE MUTUAL EXCHANGE OF SERVICES OR FACILITIES ARE TAXABLE

The error in the instant case lies in the conclusion by the Circuit Court of Appeals that the messages transmitted for respondent up to the amount of $75,000 named in the contract between respondent and the telegraph company were free. That such is not the case is readily demonstrable.

The contract (R. 15–17) in substance provides that $75,000 worth of telegraph messages "charged" for at usual tariff rates should be furnished respondent by the telegraph company in return for $75,000 worth of railroad transportation "charged" for at the usual tariff rates and other services and facilities, and an adjustment made in actual cash at the end of the year for any excess charge for services rendered to either party. If both parties render services for which the total amount "charged" is within $75,000, then no cash payment enters into the transaction. If one party exceeds the maximum allowance such party must pay in cash for such excess. If both parties render services in excess of said allowance, the party against whom the lowest amount is charged pays the excess or difference to the other. Thus in effect

the contract amounts to an agreement to arrive yearly at an account stated within certain limits, payment to be in kind measured in terms of money. This is unmistakably shown by reference to the tabular statement of respondent's yearly settlements with the telegraph company. (R. 51.) It will be noted that this statement is computed in terms of dollars and cents and shows that for the year ended August 31, 1920, the charge against respondent for telegraph service was less than $75,000, while the charge against the telegraph company for transportation service was greater than that amount. For the other two years, 1921 and 1922, given in the statement both parties to the agreement exceeded the limit of $75,000.

Considering this tabular statement and the fourth paragraph of the contract together it is plain that the conclusion that there was no consideration for the telegraph services rendered to respondent—for that is what the decision of the Circuit Court of Appeals amounts to—is erroneous. More accurately, the services were charged for and measured in terms of money and, having been so charged and measured, were paid for by other services also measured in money's worth.

The distinction which the Circuit Court of Appeals draws between the " swapping of privilege " and the swapping of " service," which is the basis of its reversal of the District Court, does not affect the essentials of the case. Indeed, it is clearly a distinction without a difference, for even if we look

upon the facilities reciprocally exchanged as a "privilege," the fact still remains that the telegraph messages constituting the so-called "privilege" received by respondent were paid for by the railroad facilities constituting the "privilege" given by respondent in return therefor, and as we have just seen, such consideration is, both by the terms of the contract and in practice, measured and charged for on the basis of money. That is sufficient to bring the case within the provisions of Sections 500(f) and 501(a), which only require a "charge" plus a measurable payment based thereon by the person to whom the telegraph services were rendered. The use of the word "paid" in the provision of Section 501 that the taxes "shall be paid by the person paying for the services or facilities rendered" does not necessarily mean the employment of money to discharge the obligation. Anderson's Dictionary of Law thus defines the word *pay*, "To discharge an obligation by a performance according to its terms or requirements, whether the obligation be for money, merchandise, or services" (citing authority).

It is also to be noted that the court holds telegraph messages up to the amount of $75,000 were not transmitted for hire and therefore are not taxable, while messages transmitted in excess of that amount were for hire and are taxable. This would seem to be an inconsistent ruling. By reference to the tabular statement on page 51 of the record, previously referred to, it will be seen that both parties

in the years 1921 and 1922 exceeded the allowance of $75,000. Consequently, under the terms of the contract, money was only paid to adjust the difference between the total for each character of service—that is, telegraph and railroad—rendered. Should not therefore the services rendered to the amount of the difference between $75,000 and the lower excess be just as free as those below $75,000? Manifestly, there is no difference in principle or legal effect.

The Government contends that the correct principle for the solution of the question in the case at bar is to be found in *Western Union Telegraph Company* v. *Delaware, Lackawanna and Western Railroad Company*, 282 Fed. 925 (D. C., N. Y. S.), and *Delaware, Lackawanna and Western Railroad Company* v. *Bowers*, decided January 22, 1926 (D. C., N. Y. S.); unreported to date, but set forth in the appendix hereto. Both of these cases involved closely similar facts and presented the same question as the instant case. In the first case the court said (p. 931):

> The Revenue Act provides that the taxes shall apply to all services rendered for hire. Giving reasonable scope to the legislative intent, the act, in my judgment, must be construed to cover all messages transmitted for an economic consideration—money or money's worth. It is difficult under a sound taxing policy to find a basis for differentiation between exchanges and cash-paid services.

> Counsel for the railroad company urges that the provisions in the act expressly providing for a tax on transportation services in respect of goods owned by the carrier indicate that the exchange of services, not being expressly enumerated, was impliedly excluded from taxation. But in my judgment these provisions tend rather to emphasize the broad and inclusive legislative intent. True, there might be some difficulty in working out the valuation to be placed upon messages transmitted under exchange of service agreements; but the administration of the act is vested in the Commissioner of Internal Revenue, who is empowered to issue regulations necessary and proper to carry into effect the general provisions of the law. The regulation issued by the Commissioner seems to comport with the general tenor of the act, and the record and arguments advanced before me do not indicate that it is unreasonable as applied to the present controversy. * * *

In the second case the court said:

> It is clear that the franked messages are not transmitted by the Telegraph Company for the benefit of the railroad without compensation, but in each case are in exchange for some valuable consideration. They are not, to be sure, paid in cash. I have had no little difficulty in arriving at a valuation for the messages, but there is a charge in fact made, and the method adopted by the Departmental Regulation fixing the value of

> the service is not unreasonable. The amount ordinarily charged to the public seems a fair measure of the worth of the service.

This is also the position adopted by the District Court in the instant case, and it is clearly sound both in law and logic.

Conclusion

In view of the large number of cases involving the same question now pending throughout the United States and the need of a definite rule for the guidance of the courts and the Treasury Department in the determination thereof, it is respectfully submitted that the petition for certiorari should be granted in this case.

WILLIAM D. MITCHELL,
Solicitor General.

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JULY, 1926.